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Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation

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Note

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American legal forums are increasingly attractive to foreign plaintiffs.[1] Because courts in the United States are more plaintiff friendly than foreign jurisdictions,[2] American courts have witnessed in recent years a surge in class action lawsuits involving foreign plaintiff classes.[3] Liberalizing trends in Europe and elsewhere have fueled the foreign appetite for litigation, but foreign courts remain hostile to American-style lawsuits.[4] The rising tide of global litigation has prompted concern among American businesses whose products and services flow

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1. Features of the U.S. legal system such as contingency fees, generous discovery and class action rules, and punitive damages make U.S. courts an "extremely attractive forum for foreign litigants." Brennan J. Torregrossa & Steven Clark, *America and England May Be New Meccas for Suits: Claimants Worldwide See U.S. and England as Ripe for Legal Actions*, NAT'L L.J., Jan. 13, 2003, at A33.

2. *See id.*

3. *See* Marguerite Higgins, *Business Lobby Decries Foreign Lawsuits*, WASH. TIMES, Mar. 26, 2004, at C11; *see also* Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282 (2002) (detailing recent litigation by foreign plaintiffs in U.S. courts seeking compensation for loss of property and personal injuries associated with World War II); Lily Henning, *Antitrust Goes Global: D.C. Circuit Opens the Door to Foreign Victims of Vitamin Price Fixing*, LEGAL TIMES, Oct. 13, 2003, at 1, 22 (discussing the use of U.S. courts by foreign plaintiff classes in vitamin price-fixing litigation).

4. For discussion of the trend toward mass litigation, see Charles Fleming, *Europe Learns Litigious Ways: Union's Tactic Spotlights Trend Toward U.S.-Style Lawsuits*, WALL ST. J., Feb. 24, 2004, at A16.

freely in the global marketplace.[5] It has also provoked debate among courts and scholars regarding the constitutional limits of jurisdiction over claims brought by foreign parties in American courts.[6]

In recent years, multinational corporations in the United States have made strategic use of a common law doctrine to remove state law claims brought by foreign plaintiffs to federal court. Under the federal common law of foreign relations, state law claims that implicate U.S. foreign relations provide defendants with a jurisdictional basis for removal to federal court. Defendants argue that in light of political branch authority in foreign relations, state law claims that impact foreign relations impinge on the federal field of foreign affairs. Thus, such claims present a substantial federal issue sufficient for federal question jurisdiction and removal to federal court. But courts remain divided over the degree of impact necessary for removal under the federal common law of foreign relations and the kinds of impact substantial enough to warrant federal question jurisdiction.

This Note argues that an expansive reading of the federal common law of foreign relations, granting federal question jurisdiction over claims implicating foreign economic and sovereign interests, is both consistent with recent foreign affairs jurisprudence and practically necessary for the effective management of increasingly global litigation. Part I details the evolution of the federal common law of foreign relations and examines the exercise of functionally similar judicial lawmaking in related constitutional fields. Part II considers whether federal courts should assert jurisdiction over state adjudication affecting foreign relations and, if so, how courts should go about analyzing claims under the federal common law of foreign relations. After examining alternative approaches to the federal common law doctrine, this Note concludes that a multifactor approach—one which measures the impact on both a foreign

5. The U.S. Chamber of Commerce recently announced plans to push for the adoption of an international agreement limiting jurisdiction over international disputes. Higgins, *supra* note 3.

6. To the extent federal common law is used as a jurisdictional basis for adjudication of customary international law, the debate has significant implications for international human rights litigation in U.S. courts. *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 464–69 (2001); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 842–48 (1997).

state's economic and sovereign interests—provides the optimal framework to assess claims that implicate U.S. foreign affairs.

I. ENDURING FEDERAL COMMON LAW

A. THE ROOTS OF JUDICIAL ACTIVISM

During the first 150 years of American jurisprudence, federal courts had broad power to discover and apply general principles of law.[7] The federal judiciary derived common lawmaking authority under the widely accepted view of law as a set of principles discovered through rational deliberation,[8] a view enshrined in the Supreme Court's decision in *Swift v. Tyson*.[9] Under the *Swift* doctrine, federal judges discovered and applied rules of decision without authorization from the Constitution, Congress, or state court decisions.[10] *Erie Railroad Co. v. Tompkins*[11] put an end to this early judicial activism. *Erie* announced that the application of federal common law to state law claims was unconstitutional because such rules of decision lacked clear congressional or constitutional authorization.[12] To the extent judge-made law lacks an explicit constitutional basis, "[t]here is no federal general common law."[13]

But federal common law has not perished altogether. On the same day the Court decided *Erie*, it held that the federal interest in apportioning interstate waters between states provided a sufficient basis for the federal judiciary's continued common lawmaking powers.[14] But the "new" federal common law was notably different from pre-*Erie* judge-made law—post-*Erie* common law derives from the authority of federal statutes, constitutional text, or constitutional structure.[15] So long as

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7. *See* Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405–08, 422 (1964).

8. Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 281 (1992).

9. 41 U.S. (16 Pet.) 1 (1842).

10. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1625 (1997).

11. 304 U.S. 64 (1938).

12. *Id.* at 78–79.

13. *Id* at 78.

14. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964) (citing *Hinderlider*, 304 U.S. at 110).

15. *See* Goldsmith, *supra* note 10, at 1626; G. Edward White, *The Historical Turn in the Constitutional Law of Foreign Relations*, 1 CHI. J. INT'L L. 133,

Congress or the Constitution authorizes the assumption of judicial power, federal courts continue to make federal common law.[16] Unlike the common law created under the *Swift* doctrine, however, this authorized federal common law becomes part of the "[l]aws of the United States" under the Supremacy Clause.[17]

Absent constitutional or statutory authorization, the Constitution provides "structural inferences" authorizing the exercise of federal common law.[18] In such cases, the judiciary's power to make common law derives from the strong federal interest in the subject matter and the demand for federal uniformity in that particular area.[19] Given the lack of textual detail underlying the foreign affairs power,[20] the federal common law of foreign relations is premised on such a structural inference. The increase in case law developing this common law doctrine indicates that with the rise of multinational corporations, foreign direct investment, and private international litigation, this doctrine is used with increasing frequency as a litigation strategy by defendants seeking removal from state courts.

B. THE FEDERAL COMMON LAW OF FOREIGN RELATIONS AS LITIGATION STRATEGY

Federal courts have limited jurisdiction over cases "arising under" the U.S. Constitution, laws, or treaties.[21] The classic formulation of a claim that "arises under" is found in *Louisville & Nashville Railroad Co. v. Mottley*,[22] which requires the plaintiff's cause of action on its face to present a question of federal

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137 (2000).

16. Friendly, *supra* note 7, at 405–07. For example, federal courts exercise common law powers over interstate disputes, where judicial authorization is provided for in the text of the Constitution. U.S. CONST. art. III, § 2, cl. 1.

17. U.S. CONST. art. VI, cl. 2; *see also* Bradley & Goldsmith, *supra* note 6, at 842 n.176.

18. *See* Goldsmith, *supra* note 10, at 1626–27.

19. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

20. The U.S. Constitution grants Congress the power to declare war, to raise and support armies, and to provide and maintain a navy. U.S. CONST. art. I, § 8, cl. 11–13. It grants the president powers as commander in chief of the army and navy, and the power to make treaties. *Id.* art. II, § 2, cl. 1–2; *see* Deutsch v. Turner Corp., 324 F.3d 692, 711 (9th Cir. 2003).

21. 28 U.S.C. § 1331 (2002). Congress enacted § 1331 under the authorization of Article III, which provides: "The judicial Power shall extend to all Cases, . . . arising under this Constitution, the Laws of the United States, and Treaties made, . . . under their Authority." U.S. CONST. art. III, § 2, cl. 1.

22. 211 U.S. 149 (1908).

law.[23] Under *Mottley* and the well-pleaded complaint rule, a plaintiff cannot establish a federal claim merely by anticipating a federal defense, nor does a federal defense establish federal question jurisdiction.[24] Rather, federal law must itself create the plaintiff's cause of action.[25] The Supreme Court has advanced the well-pleaded complaint rule beyond *Mottley* to encompass a state law claim that "necessarily depends on resolution of a substantial question of federal law."[26] But simply because a plaintiff's claim has some imbedded federal issue is not enough to establish federal question jurisdiction under 28 U.S.C. § 1331.[27] The federal issue requiring resolution must be "substantial."[28] In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Court suggested that a federal issue is not sufficiently "substantial" where Congress has expressly precluded a federal private remedy for the violation of a federal statute.[29] To find a federal question in such circumstances would "flout congressional intent" to exclude a federal cause of action.[30]

However, the question of when a federal issue is substantial enough to support federal question jurisdiction remains unsettled, particularly where Congress has not spoken to exclude a federal right of action. The Court has offered little guidance, declaring that courts must make "principled, pragmatic distinctions . . . [engaging in] 'a selective process which picks the substantial causes out of the web and lays the other ones aside.'"[31] Thus, some courts view *Merrell Dow* narrowly, foreclosing federal question jurisdiction in the absence of a federal cause of action. For example, in *Seinfeld v. Austen*,[32] the Seventh Circuit held that a congressionally created right of action is necessary to support federal question jurisdiction in deciding

23. *Id.* at 152.

24. *Id.* The Supreme Court has applied the well-pleaded complaint rule to counterclaims, ruling that a defendant's counterclaim cannot serve as a basis for "arising under" jurisdiction. *See* Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831–32 (2002).

25. *See Mottley*, 211 U.S. at 152; Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

26. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 28 (1983).

27. *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 813 (1986).

28. *Id.* at 813–14.

29. *Id.* at 814.

30. *Id.* at 812.

31. *Id.* (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936)).

32. 39 F.3d 761 (7th Cir. 1994).

whether the plaintiff's complaint presented a question of federal law.[33] In contrast, the Second Circuit has found that under *Merrell Dow*, a federal cause of action is sufficient but not required to create federal question jurisdiction.[34] Thus, whether Congress's failure to create a cause of action evidences its intent to foreclose federal jurisdiction remains unsettled.[35] Indeed, *Merrell Dow* underscored the need for judicial discretion, practicality, and necessity in making federal question determinations under § 1331.[36]

The debate over the application of the federal common law of foreign relations as a basis for federal question jurisdiction is in part a function of how strictly the well-pleaded complaint rule should apply to cases implicating foreign relations.[37] In the context of private international litigation, a foreign plaintiff brings a lawsuit against a U.S. multinational corporation in its home state court and alleges only state law claims, thus preventing defendants from removing those claims to federal court.[38] Under § 1441(b), defendants sued in their home states may not remove to federal court despite complete diversity between parties under § 1332.[39] By depriving defendants a fed-

33. *Id.* at 764 n.2; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 933 (4th ed. 1996) (discussing lower courts' treatment of the role of congressionally created rights of action in determining federal question jurisdiction).

34. *See* W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188, 193 (2d Cir. 1987); *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 377 F.3d 592, 594–97 (6th Cir. 2004) (finding a substantial federal interest sufficient to create federal question jurisdiction where the federal tax code is necessary to resolve the state law issue), *cert. granted in part*, 125 S. Ct. 824 (2005); Bracey v. Bd. of Educ., 368 F.3d 108, 113–15 (2d Cir. 2004) (discussing the differing views among circuits regarding when a federal issue is "substantial" enough to support federal question jurisdiction).

35. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 286–87 (4th ed. 2003). The Supreme Court has recently granted certiorari on this question. *Darue*, 125 S. Ct. at 824.

36. *Merrell Dow*, 478 U.S. at 812–14; *see also* FALLON ET AL., *supra* note 33, at 932.

37. *See, e.g.*, Republic of Venezuela v. Philip Morris Inc., 287 F.3d 192, 200–01 (D.C. Cir. 2002) (Williams, J., concurring); O'Neill v. St. Jude Med., Inc., No. Civ. 04-1211(JRT), 2004 WL 1765335 at *1 (D. Minn. Aug. 5, 2004).

38. *See, e.g.*, Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001) (Central American banana workers brought state law causes of action in Hawaiian state court), *aff'd in part*, 538 U.S. 468 (2003).

39. State law claims between diverse parties are "removable only if none of the parties . . . is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (2002). Because diversity jurisdiction under § 1332 seeks to protect defendants from prejudicial juries in the plaintiff's chosen forum, this

eral forum, plaintiffs may enjoy more relaxed forum non conveniens standards and avoid higher burdens of proof and the strict standing requirements of federal court.[40] Defendants argue in turn that the lawsuit impacts U.S. foreign relations, and thus "arises under" the federal common law of foreign relations within the meaning of § 1331.[41] That is, to the extent the litigation impinges on the federal foreign relations power, but is not proscribed by express federal statute, the judiciary may assert jurisdiction based on its common lawmaking powers in foreign relations. However, courts disagree on the foreign relations impact necessary to "arise under" judge-made law as a federal question. Analysis of this question requires a survey of the doctrine's historical development and application.

C. THE FOREIGN RELATIONS ENCLAVE

1. Making Common Law in *Sabbatino*

The Supreme Court first made federal common law in the area of foreign relations in *Banco Nacional de Cuba v. Sabbatino*.[42] Responding to a reduction by the United States of its Cuban sugar quota, the Cuban government expropriated proceeds of a sugar shipment by a Cuban corporation owned principally by U.S. residents.[43] A Cuban bank brought an action for conversion of bills of lading to recover the proceeds of the sugar.[44] The defendant argued that because the Cuban expropriation violated international law, the bank could not claim a right to the proceeds.[45] The bank responded that the act of state doctrine precluded the Court from inquiring into the va-

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rationale is obviated where plaintiffs sue in defendants' home state. *See* 28 U.S.C. § 1332 (2002).

40. *See, e.g.*, Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 189–91 (1999); Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 525–27 (1996).

41. *See infra* Part I.C.2. Federal question jurisdiction "will support claims founded upon federal common law." Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972). It is generally agreed that a cause of action implied from the Constitution, federal statute, or the federal common law "arises under" federal law under § 1331. *See* FALLON ET AL., *supra* note 33, at 933–34.

42. 376 U.S. 398 (1964).

43. *Id.* at 403–06.

44. *Id.* at 406.

45. *See id.* at 420.

lidity of the Cuban expropriation[46] since, under the doctrine, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[47] The Court held that, while the act of state doctrine was not required under the Constitution, federal statute, or international law,[48] the doctrine nonetheless precluded judicial examination of the Cuban government's actions.[49]

The *Sabbatino* Court, examining its authority to adopt the act of state doctrine, noted broad foreign affairs powers of the executive and legislative branches,[50] but rejected the conclusion that issues impacting foreign relations are therefore beyond the judiciary's reach.[51] Justice Harlan, writing for the majority, stated that the act of state doctrine is a matter of federal law with "constitutional underpinnings" within the competence of the judiciary.[52] International legal issues should not be left to the possibility of "divergent" and "parochial" state interpretation, and therefore *Erie*'s general prohibition on federal common law was inapplicable to the act of state doctrine.[53] The "uniquely federal interests"[54] relating to foreign relations provided a sufficient basis for the Court's adoption of the act of state doctrine as federal common law.[55]

In broad strokes, *Sabbatino* established the federal common law of foreign relations. The Court's analysis of the act of state doctrine was based on a judicial assessment of U.S. foreign relations interests, reaffirming the judiciary's power to make law on its own authority.[56] While neither the Constitution nor federal statute dictated the act of state doctrine, the Court exercised an independent power to determine that the

46. *See id.* at 400–01.

47. *Id.* at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

48. *Id.* at 421–27.

49. *Id.* at 420.

50. *Id.* at 421–28.

51. *Id.* at 423 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

52. *Id.*

53. *Id.* at 425 (noting that "the Court did not have rules like the act of state doctrine in mind" when it announced the *Erie* doctrine).

54. *Id.* at 426 (citing D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447 (1942); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)).

55. *See id.* at 425–27.

56. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 139 (2d ed. 1996); *see also* Goldsmith, *supra* note 10, at 1628.

act of state doctrine was part of the federal common law.[57] The act of state doctrine was thus the first, though not the last, instance of judicial lawmaking involving foreign relations.

2. Expanding Federal Jurisdiction after *Sabbatino*

Sabbatino's proposition that the federal judiciary has an independent power to make law in foreign affairs[58] has crept steadily beyond the act of state doctrine to encompass a jurisdictional basis over state law claims that impact U.S. relations with other countries.[59] The federal nature of issues that impact U.S. foreign relations—based principally on the need for national uniformity and the risks of parochial state action—has been used to support federal question jurisdiction where no other basis for subject matter jurisdiction exists.[60] As a litigation strategy, U.S. defendants sued by foreign parties in their home state argue that *Sabbatino* allows removal to federal court of otherwise state law claims, because the federal judiciary has power to adjudicate claims impacting foreign relations.[61]

That a claim involving the legality of an act of a foreign state gives rise to federal question jurisdiction is uncontroversial.[62] Nor do courts dispute that claims based generally on federal common law, as opposed to a constitutional or statutory basis, provide a sufficient basis for removal from state court.[63] But disagreement exists over whether federal question jurisdiction should extend to state law claims that merely affect foreign relations—whether *Sabbatino* can be used as a basis for federal question jurisdiction.[64] This disagreement falls generally into three categories. First, as noted above, the courts of appeals have not achieved a consensus on whether a defense invoking

57. HENKIN, *supra* note 56, at 139.

58. *See* Goldsmith, *supra* note 10, at 1629 n.47.

59. The *Sabbatino* Court did not reach the question of federal question jurisdiction under the common law of foreign relations because the Court had diversity jurisdiction under 28 U.S.C. § 1332. *See* 376 U.S. at 421 n.20.

60. *See infra* Part I.C.2.a.

61. *See, e.g.*, Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62 (S.D. Tex. 1994); *see also supra* Part I.B.

62. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 802 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003).

63. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972); FALLON ET AL., *supra* note 33, at 933–34.

64. *See* Goldsmith, *supra* note 10, at 1632–33.

the common law of foreign relations presents a substantial federal issue sufficient to satisfy jurisdictional requirements of § 1331.[65] Second, courts have failed to define the precise point at which claims impacting foreign states will trigger federal question jurisdiction under the common law of foreign relations.[66] Third, disagreement exists over whether courts are institutionally competent to make such policy judgments in the first instance.[67]

a. The Rise: Expanding Federal Question Jurisdiction in Foreign Relations

In *Republic of the Philippines v. Marcos*,[68] the Philippine government brought a state law conversion claim against Ferdinand Marcos, its former dictator, for "ill-gotten wealth" obtained illicitly with government funds.[69] The Second Circuit addressed whether federal question jurisdiction exists over state law actions implicating U.S. foreign relations.[70] The court stated that claims that "directly and significantly affect American foreign relations" fall under federal question jurisdiction,[71] relying on two distinct grounds for jurisdiction over the state law claim.[72] First, the court found that the state law conversion claim was completely preempted by federal common law,[73] since the federal law of foreign relations is so powerful it displaces any competing state law.[74] Second, even absent complete

65. *Compare* Republic of Venezuela v. Philip Morris Inc., 287 F.3d 192, 200–01 (D.C. Cir. 2002) (Williams, J., concurring) (framing the debate as a dispute over the well-pleaded complaint rule and applying a narrow reading of that rule), *with Torres*, 113 F.3d at 542–43 (finding federal question jurisdiction despite purely state law claims because "plaintiff's complaint raises substantial questions of federal common law by implicating important foreign policy concerns"), *and Sequihua*, 847 F. Supp. at 62 (noting that essential elements of the plaintiffs' claims, if "'well-pleaded,' require the application . . . of the federal common law regarding foreign relations").

66. *See* Goldsmith, *supra* note 10, at 1632.

67. *See, e.g., Patrickson*, 251 F.3d at 803–05; *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000).

68. 806 F.2d 344 (2d Cir. 1986).

69. *Id.* at 347 n.2, 354.

70. *Id.* at 353.

71. *Id.* at 352.

72. *Id.* at 354–55.

73. *See infra* notes 123–30 and accompanying text (discussing complete preemption).

74. *Marcos*, 806 F.2d at 354 (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23 (1983)); Avco Corp. v. Aero Lodge No. 735, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968).

preemption, the court stated that the existence of a federal issue in a state-created cause of action supports federal question jurisdiction.[75] Echoing Justice Harlan in *Sabbatino*,[76] the court cited the need for uniformity in adjudicating claims involving the request of a foreign government as further support for federal question jurisdiction.[77] The Second Circuit was thus the first to conclude that federal question jurisdiction exists over actions having "important foreign policy implications."[78] It expanded the reach of *Sabbatino* beyond the act of state doctrine, using that decision as a basis for federal question jurisdiction over issues that merely implicate important foreign relations concerns.[79]

Since *Marcos*, courts have diverged in their analysis of state law claims touching foreign relations. The Fifth and Eleventh Circuits have followed the Second Circuit approach, reading the federal common law of foreign relations as conferring federal jurisdiction over state law claims implicating foreign economic and sovereign interests.[80] In *Torres v. Southern Peru Copper Corp.*, Peruvian plaintiffs brought state tort claims against the defendant in Texas state court, alleging injuries caused by Southern Peru Copper Corporation's sulfur dioxide emissions in Peru.[81] Defendants removed to federal court, arguing the litigation raised substantial questions of federal law by implicating the federal common law of foreign relations.[82] On appeal, the Fifth Circuit noted two possible applications of the well-pleaded complaint rule: either the complaint on its face

75. *Marcos*, 806 F.2d at 354 (citing Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 810 (1986)).

76. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

77. *Marcos*, 806 F.2d at 354.

78. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 801 (9th Cir. 2001) (quoting *Marcos*, 806 F.2d at 353), *aff'd in part*, 538 U.S. 468 (2003).

79. *See id.* at 802; *Marcos*, 806 F.2d at 352–53.

80. *E.g.*, Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997) (finding federal question jurisdiction over state law claim that "strikes not only at vital economic interests but also at . . . sovereign interests by seeking damages for activities and policies in which the government actively has been engaged"); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62 (S.D. Tex. 1994); *see also* Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377–79 (11th Cir. 1998). *But see In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 36 (D.D.C. 2000) (criticizing the Fifth and Eleventh Circuits' application of the federal common law of foreign relations to state law claims that merely implicate foreign policy concerns).

81. *Torres*, 113 F.3d at 541.

82. *Id.* at 542.

contains a cause of action created by federal law, or the asserted state-law claim requires "resolution of a substantial question of federal law."[83] Because the plaintiffs alleged only state law claims, the court examined several factors to determine whether the complaint presented a substantial federal issue, including: (1) Peru's formal complaint and protests to the State Department regarding the lawsuit;[84] (2) the economic importance of the mining industry to Peru;[85] and (3) Peru's ownership interests, participation, and regulatory activity within the country's mining industry.[86]

While no one factor was determinative,[87] the *Torres* court found the sum of these factors sufficient to create a substantial question of federal law by implicating the federal common law of foreign relations.[88] Thus, to the extent state law claims affect the "vital economic and sovereign interests" of foreign states,[89] the court affirmed the district court's finding of federal question jurisdiction over the state law claims.[90] Following the *Torres* court's analysis, the Fifth and Eleventh Circuits have proceeded cautiously,[91] affirming a multifactor, case-by-case approach to determining whether a state claim raises a substantial question of federal law under the federal common law of foreign relations.[92]

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83. *Id.* (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13 (1983)).

84. *Id.* at 542–43.

85. *Id.* at 543 (noting that the mining industry is critical to Peru's economy, contributing "up to 50% of its export income and 11% of its gross domestic product").

86. *Id.* (stating that Peru owned the land, minerals, and refinery involved in Southern Peru Copper Corporation's mining activities, and extensively regulated the mining industry during the period in question).

87. *See id.*

88. *Id.* at 542–43.

89. *Id.* at 543 n.8.

90. *Id.* at 543.

91. *See, e.g.*, Marathon Oil Co. v. Ruhrgas, 115 F.3d 315, 320 (5th Cir. 1997), *vacated* 129 F.3d 746 (en banc) (noting that the *Torres* holding is "a very specific application of the well-pleaded complaint rule" under which the state law claim necessarily requires "'resolution of a substantial question of federal law'") (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13 (1983)).

92. *See* Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377–79 (11th Cir. 1998).

b. The Demise: Retracting Federal Question Jurisdiction

Other courts view the use of *Sabbatino* as a basis for federal question jurisdiction as stretching the doctrine of the federal common law of foreign relations too far.[93] The Ninth Circuit has offered the most explicit rejection of an expansive reading of the federal common law of foreign relations.[94] In *Patrickson v. Dole Food Co.*, Latin American banana workers brought a class action in a Hawaiian state court alleging injuries caused by exposure to a toxic pesticide used by the Dole Food Company.[95] Dole removed the action to federal court, invoking the federal common law of foreign relations as a basis of federal question jurisdiction under § 1331.[96] The district court denied the workers' motion to remand and dismissed the case on forum non conveniens grounds.[97] The Ninth Circuit reversed, remanding the class action to state court,[98] and criticizing the federal common law doctrine as used by defendants to remove actions to federal court.[99]

Writing for the Ninth Circuit, Judge Alex Kozinski offered several explicit criticisms of the Fifth and Eleventh Circuits' expansive approach to the federal common law of foreign relations. First, under the well-pleaded complaint rule, federal courts may not exercise jurisdiction unless a federal right or immunity is an essential element of the plaintiff's cause of action.[100] The court had no doubt that the plaintiffs' complaint arose under state law,[101] characterizing the approach of the Fifth and Eleventh Circuits as an exception to the well-pleaded complaint rule.[102] Second, the Ninth Circuit read *Sabbatino* as extending federal question jurisdiction only to acts of foreign states given legal force in U.S. courts.[103] This narrow reading construed *Marcos* as concerned primarily with an act of the

93. *See, e.g.*, *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 37 (D.D.C. 2000).

94. Patrickson v. Dole Food Co., 251 F.3d 795, 799–803 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003).

95. *Id.* at 798.

96. *Id.*

97. *Id.*

98. *Id.* at 808–09.

99. *Id.* at 801–05.

100. *Id.* at 799 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 11 (1983)).

101. *Id.*

102. *Id.* at 801.

103. *See id.* at 795.

Philippine government—an extension of the act of state doctrine.[104] Although the *Marcos* court "clearly *said* more" than this,[105] its suggestion that a case affecting U.S. foreign relations establishes federal question jurisdiction "reads far too much into *Sabbatino*."[106]

Third, the *Patrickson* court stated that while Congress has in certain instances provided statutory grants of jurisdiction over cases implicating foreign relations,[107] it had not granted federal question jurisdiction over suits in which the federal common law of foreign relations may arise.[108] Congress could have spoken to the issue of federal jurisdiction over such claims but declined to grant power to the federal judiciary in such matters.[109]

Finally, the court criticized an expansive approach to the federal common law of foreign relations on grounds of institutional competence.[110] Characterizing the Fifth and Eleventh Circuits' inquiries as whether a foreign government is "pleased or displeased by the litigation," the court rejected the notion that federal courts were competent to make inherently political judgments about when foreign nations will be offended by litigation.[111] And because federal and state courts are equally bad at making such judgments, the *Patrickson* court suggested that the lack of federal superiority precludes federal question jurisdiction.

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104. *Id.* at 801. According to the court, the Second Circuit's decision was grounded in the act of state doctrine "[b]ecause the Republic's claims rested on the Philippine executive order." *Id.* (citing Republic of Philippines v. Marcos, 806 F.2d 344, 354 (2d Cir. 1986)).

105. *Id.* at 802.

106. *Id.*

107. *Id.* at 803. The court cited as examples of such statutory grants of federal jurisdiction: 28 U.S.C. § 1251(b)(1) (2002) (jurisdiction over suits in which ambassadors or other foreign government officials are parties); § 1351 (jurisdiction over suits against foreign consuls or diplomats); and § 1350 (jurisdiction over suits brought by an alien for torts committed in violation of international law).

108. *Patrickson*, 251 F.3d at 803.

109. *See id.*

110. *Id.* at 803–05; *see also In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000).

111. *Patrickson*, 251 F.3d at 804; *In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d at 38.

D. DORMANT POWER AND PREEMPTION IN FOREIGN RELATIONS

While the line of cases following *Sabbatino* concerns the federal judiciary's power to exercise jurisdiction over state law claims under the federal common law of foreign relations, federal courts have exercised a "similar foreign relations lawmaking power" in cases involving the dormant foreign affairs power.[112] Courts invoke the dormant foreign affairs power when states legislate in areas touching foreign relations which the federal government has not addressed.[113] An examination of dormant foreign affairs jurisprudence reveals that it is functionally equivalent to the Court's application of the federal common law of foreign relations. Both the federal common law of foreign relations and the dormant foreign affairs power are judge-made federal law, relying on independent assessments of foreign policy implications, subject to congressional revision, and based on judicial authority derived from constitutional structure.[114] Moreover, the dormant foreign affairs power is a useful analogy for examining alternative grounds for removal jurisdiction and developing a more flexible jurisdictional standard for claims implicating the federal common law of foreign relations.

1. Dormant Powers and Foreign Affairs

While Article I gives Congress authority to regulate both domestic and international commerce,[115] the Supreme Court has read in that grant of power a "dormant" component. Under the dormant Commerce Clause, even in the absence of federal legislation, attempts by states to regulate commerce may be restricted.[116] Where Congress has not spoken directly to state regulation of commerce, courts must make independent determinations regarding whether such regulations should be nationally uniform.[117] Courts generally invalidate state regula-

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112. *See* Goldsmith, *supra* note 10, at 1629.

113. *See* Zschernig v. Miller, 389 U.S. 429, 436 (1968).

114. *See* Goldsmith, *supra* note 10, at 1630–31.

115. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

116. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1095–97 (1986).

117. The Supreme Court articulated this need for national uniformity in *Cooley v. Bd. of Port Wardens*, 53 U.S. (12 How.) 299, 314 (1852).

tions that facially discriminate on the basis of geography,[118] and examine the purpose and effects of state laws that are not facially discriminatory.[119] Congress has power to repudiate or modify what courts say the dormant Commerce Clause would forbid.[120] Unlike the Commerce Clause, the Constitution provides little textual detail establishing a federal foreign affairs power.[121] Courts have nonetheless read such power into the Constitution,[122] and have applied it to preempt state regulations that impact U.S. foreign relations.[123] Significantly, a broad reading of dormant foreign affairs preemption suggests an alternative basis for removal of a claim implicating the federal common law of foreign relations.

The Court has recently clarified when a cause of action may be removed to federal court under the doctrine of complete preemption.[124] Under the well-pleaded complaint rule, a defense of conflict preemption is not removable to federal court.[125] However, when a federal statute provides an exclusive cause of

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118. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (establishing a "virtually *per se* rule of invalidity" for state law that "overtly blocks the flow of interstate commerce at a State's borders").

119. *See* Pike v. Bruce Church, Inc., 397 U.S 137, 142 (1970). The dormant foreign Commerce Clause substantially parallels its domestic counterpart. *See* HENKIN, *supra* note 56, at 158–62.

120. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 572 (1997); HENKIN, *supra* note 56, at 135.

121. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003); Deutsch v. Turner Corp., 324 F.3d 692, 711 (9th Cir. 2003); Bradley, *supra* note 3, at 285–86.

122. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

123. Under the Supremacy Clause, an express provision of federal law that conflicts with state law preempts that state law. U.S. CONST. art. VI, cl. 2. Where no express federal provision exists, courts have determined that state law is nonetheless preempted when Congress intends federal law to "occupy the field," even where the state law does not conflict with federal legislation. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (quoting California v. ARC Am. Corp., 490 U.S. 93, 100 (1989)); HENKIN, *supra* note 56, at 157–58 (suggesting that acts of Congress, treaties, executive agreements, and even judicial doctrines might suffice to "occupy[ ] the field" in foreign relations). Such instances of conflict or "statutory" preemption are distinguished from "dormant" preemption, in which state legislation is invalidated despite the absence of federal legislation because the state law infringes more generally upon some federal power. *See generally* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 203–04 (discussing statutory and dormant preemption in the context of foreign relations).

124. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10–11 (2003).

125. Caterpillar, Inc. v. Williams, 482 U.S. 386, 398–99 (1987); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13, 26 (1983).

action for a claim brought under state law, such claim is removable to federal court under complete preemption.[126] While lower courts' complete preemption analysis focused narrowly on whether Congress intended a cause of action to be removable,[127] the Court in *Beneficial National Bank v. Anderson* suggested a broader standard. Although congressional intent remains the "touchstone" of preemption analysis,[128] the Court extended complete preemption removal to instances: (1) where Congress explicitly provides for removal in federal legislation;[129] and (2) where Congress intends a federal cause of action exclusive to state actions.[130] Thus, by changing the inquiry from an intent to remove to an intent to exclude, *Beneficial* blurs the line between complete preemption and ordinary statutory preemption. In other words, a finding of conflict between state and federal law may imply congressional intent to exclude the state cause of action.[131] Moreover, a post-*Beneficial* reading of dormant foreign affairs preemption, premised on exclusive federal power in foreign relations, suggests that state law claims impacting foreign relations may be removable by complete preemption.

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126. *See Franchise Tax Bd.*, 463 U.S. at 23–26; Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559–60 (1968).

127. *See, e.g.*, Anderson v. H & R Block, Inc., 287 F.3d 1038, 1042 (11th Cir. 2002) (citing *Caterpillar*, 482 U.S. at 393), *rev'd sub nom. Beneficial Nat'l Bank*, 539 U.S. at 1 (2003); Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000); BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851, 857 (11th Cir. 1999). Lower courts have struggled to develop analytical frameworks to determine precisely when state law causes of action are preempted by federal law. *See* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1797–98 (1998). Courts are generally reluctant to interfere with state sovereignty and the plaintiff's status as master of the complaint, *see id.* at 1798, and have grappled with the "necessary quantum of congressional intent" that will support complete preemption removal. *Id.* at 1797 n.109 (citation omitted).

128. *See Taylor*, 481 U.S. at 66.

129. *Beneficial*, 539 U.S. at 6 (citing the Price-Anderson Act as authorizing removal jurisdiction "over tort actions arising out of nuclear accidents").

130. *Id.* at 9 n.5 (stating that the "proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable").

131. *See id.* at 21 (Scalia, J., dissenting) (criticizing the proposition that "the existence of a pre-emptive federal cause of action causes the invalid assertion of a state cause of action to raise a federal question").

2. The Court's Dormant Foreign Affairs Power

The Supreme Court in *Zschernig v. Miller*[132] first recognized a dormant foreign affairs power and its correlative foreign affairs preemption doctrine. The Court addressed the constitutionality of an Oregon probate statute that denied inheritance rights to heirs in Communist countries if they could not show that those countries established reciprocal inheritance rights for Americans.[133] Despite the absence of federal statutes or treaties regulating probate laws, Justice Douglas stated that the Oregon law constituted "judicial criticism" of foreign states.[134] The Court therefore struck the probate law as a state intrusion into the field of foreign affairs.[135]

Similar to cases implicating the federal common law of foreign relations, *Zschernig* relied on the judiciary's power to make an independent assessment of the impact of a state law on foreign relations.[136] Although the Court did not articulate a test for determining when the foreign affairs power preempts state law, it noted that the Oregon probate law had more than "some incidental or indirect effect" on foreign states.[137] Thus, while *Zschernig* did not address questions of federal jurisdiction over state law claims, it established a broad foreign affairs field preempting state law with even incidental effects on foreign relations.[138]

The Supreme Court recently affirmed its power to independently assess and ultimately invalidate state law under the dormant foreign affairs power. In *American Insurance Ass'n v. Garamendi*, the Court addressed California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which required insurers doing business in the State to disclose information about policies sold in Europe between 1920 and 1945.[139] American and European insurance companies challenged the constitutionality

132. 389 U.S. 429 (1968).

133. *Id.* at 430 n.1.

134. *Id.* at 440.

135. *Id.* at 432.

136. *See* HENKIN, *supra* note 56, at 135 n.15; Goldsmith, *supra* note 10, at 1629.

137. *Zschernig*, 389 U.S. at 434 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)); *see also* Bradley, *supra* note 3, at 286.

138. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 417–18 (2003).

139. *Id.* at 401. The California law sought to ensure that insurers or their related companies involved in the seizure of Jewish life insurance policies in Nazi Germany were disclosed to the State. *Id.* at 410.

of HVIRA in federal court, arguing that it violated both the federal foreign affairs power and the Commerce Clause.[140] Although the executive branch had agreed with Germany to address such insurance claims, these executive agreements included no explicit preemption clause, prompting defendants to rely on *Zschernig*'s general prohibition of interference with U.S. foreign policy.[141]

The Court affirmed its broad reading of the preemption doctrine in the field of foreign affairs,[142] but on the narrower grounds of conflict with an executive statement of foreign policy.[143] Justice Souter, writing for the majority, stated that the need for national uniformity required state laws affecting foreign affairs to yield to the federal foreign relations power.[144] The Court further noted that under *Zschernig*, state action is preempted, even in the absence of federal activity, as long as the state law has more than incidental effects in foreign affairs.[145] Justice Souter also recognized disagreement over whether invalidation of state law under the foreign affairs power requires choosing between the theories of field and conflict preemption.[146] Although resolution of HVIRA did not require answering this question, the Court suggested a balancing test for determining when state action is preempted under foreign affairs powers.[147] Such a test would require conflict preemption in areas of traditional state legislation, and field pre-

140. *Id.* at 412.

141. *Id.* at 416–18. According to the Court, "valid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward." *Id.* at 416–17 (footnote omitted).

142. *Id.* at 418.

143. *Id.*

144. *Id.* at 413–14.

145. *Id.* at 418; *cf.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 376 (2000) (invalidating a Massachusetts law that restricted state agencies from purchasing goods or services from Burma on grounds that the law conflicted with a federal sanctions statute against Burma, but declining to reach the issue of dormant preemption).

146. *Garamendi*, 539 U.S. at 419–20. The dispute in *Zschernig* was between Justice Harlan, who argued that preemption was unwarranted in the absence of some conflicting federal action, and the *Zschernig* majority, which established a broad field preemption. *See* Zschernig v. Miller, 389 U.S. 429, 459–60 (1968) (Harlan, J., concurring); *see also supra* note 123 and accompanying text.

147. *See Garamendi*, 539 U.S. at 420 (citing HENKIN, *supra* note 56, at 164).

emption where a state has "no serious claim" to a traditional state responsibility.[148]

Thus, recent treatment of the dormant foreign affairs power suggests an alternative framework for examining the judiciary's role in foreign relations, and provides support for removal jurisdiction over claims impacting the federal common law of foreign relations. Like the Court's dormant foreign affairs analysis, the federal common law of foreign relations is judge-made federal law authorized by the structure of the Constitution. While the analyses are not identical,[149] both rely on independent assessments of foreign policy questions, seeking to ensure uniformity in foreign relations and subject to congressional revision.[150] And while *Garamendi* does not deal expressly with federal jurisdiction, its broad reading of the foreign affairs power and its dormant preemption analysis supports expansive federal jurisdiction over the federal common law of foreign relations.[151]

II. FEDERALIZING FOREIGN RELATIONS

A. LEGITIMIZING AN EXPANSIVE APPROACH TO THE FEDERAL COMMON LAW OF FOREIGN RELATIONS

A narrow reading of the federal common law of foreign relations criticizes the doctrine's procedural and practical shortcomings.[152] Thus, a state law claim directly concerning the actions of a foreign state is substantial enough to raise a federal question, while a lawsuit that merely impacts a foreign state's economy, invokes sovereign protests, or has some other impact

148. *Id.* at 419 n.11 (citing *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring)).

149. Dormant foreign affairs preemption requires "more than incidental" effects on foreign relations, *see id.* at 418, while an action under the federal common law of foreign relations must "strike[ ] . . . at vital economic . . . [and] sovereign interests." *See* Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997).

150. *See* Goldsmith, *supra* note 10, at 1630–31. Congressional power to revise Court decisions in foreign affairs stems from the justification of the judiciary's common lawmaking authority in foreign affairs, i.e., protecting the political branches and insuring national uniformity in foreign affairs. *See id.* at 1630 n.56.

151. *See supra* Part I.C.2.

152. *See* Republic of Venezuela v. Philip Morris Inc., 287 F.3d 192, 200–01 (D.C. Cir. 2002) (Williams, J., concurring); Patrickson v. Dole Food Co., 251 F.3d 795, 800 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003).

on foreign relations will not raise a federal question.[153] This approach gives short shrift to the well-pleaded complaint rule. Moreover, it overlooks the increasing likelihood that some private international litigation will have a major impact on a foreign state's economic and sovereign interests, warranting federal jurisdiction.

In contrast, an expansive application of the federal common law of foreign relations, granting federal question jurisdiction over claims implicating foreign economic and sovereign interests, is consistent with the Court's constitutionally related foreign affairs jurisprudence. An examination of: (1) judicial competence to measure foreign relations; (2) the applicable standards for the well-pleaded complaint rule; and (3) alternative grounds for removal jurisdiction, supports the continued use of the federal common law doctrine as a valid basis for removal. A multifactor approach to the federal common law of foreign relations relies on the judiciary's ability to gauge the empirical impact of litigation on foreign states. This approach not only allows for pragmatic management of increasing global litigation, but it also remains subject to political branch revision, posing little threat to "political branch hegemony"[154] in foreign affairs.

1. Institutional Competence as a Matter of Policy

Courts and scholars have balked at the federal judiciary's capacity to evaluate foreign policy implications. Critics contend that federal courts are institutionally incompetent to confer federal question jurisdiction under the federal common law of foreign relations because courts: (1) lack expertise to decipher when and how a claim implicates foreign relations; (2) lack authority to make "inherently political" judgments in foreign affairs;[155] and (3) have no particular advantage over state courts to deal with such claims.[156] Moreover, simply removing a state

153. *See Patrickson*, 251 F.3d at 800.

154. *See* Bradley & Goldsmith, *supra* note 6, at 861.

155. Although issues involving foreign relations may present political questions, making those issues inappropriate for judicial review, the Supreme Court has limited the application of the political question doctrine in foreign relations. *See* CHEMERINSKY, *supra* note 35, at 143–46, 155–56. Specifically, the political question doctrine has been limited to: (1) determination of when wars begin or end; (2) recognition of foreign governments; (3) ratification and interpretation of treaties; and (4) challenges to the president's war powers, making those issues nonjusticiable. *See id.* at 156–58.

156. *See Patrickson*, 251 F.3d at 803–05; *In re* Tobacco/Governmental

law claim to federal court gives no assurance it will have less effect on foreign relations.[157] While these criticisms raise valid concerns regarding both separation of powers and the allocation of power between state and federal government,[158] they generally misconstrue the expansive approach to the federal common law of foreign relations as a basis for federal question jurisdiction.[159]

First, an expansive approach to claims implicating foreign affairs has gradually evolved from an emphasis on foreign protests to the lawsuit[160] to an evaluation of multiple factors to measure the impact of such a lawsuit on the state's economic and sovereign interests.[161] The *Torres* court specifically noted that the protests of a foreign state could not be determinative in its analysis.[162] Rather, foreign opposition to domestic litigation serves merely to alert the court to the potential impact such litigation might have on that country's economic and sovereign interests.[163]

Second, a multifactor approach to the federal common law doctrine requires judicial determinations wholly within the competence of the federal courts. Courts consider factors including: (1) the economic importance of an industry to the foreign state; (2) the foreign government's regulatory interests in the industry; and (3) the foreign government's sovereign interests in the litigation.[164] None of these is inherently beyond the ability of the federal judiciary to measure empirical effects,

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Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000); Bradley, *supra* note 3, at 287–88.

157. *Patrickson*, 251 F.3d at 803.

158. *See, e.g.*, Bradley, *supra* note 6, at 466–69 (arguing that courts should not apply the federal common law of foreign relations because they are acting as legislators).

159. *See Patrickson*, 251 F.3d at 804 & n.9 (characterizing the Fifth and Eleventh Circuit approach as inquiring whether a foreign sovereign is "pleased or displeased by the litigation," and "[i]nviting foreign states to tell us how litigation in our courts affects their interests").

160. Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62 (S.D. Tex. 1994) (stating that Ecuador's official protests to litigation threatens U.S. foreign relations interests and gives rise to a federal question).

161. *See, e.g.*, Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377–79 (11th Cir. 1998) (applying multiple factors to determine whether a claim implicating foreign relations is substantial enough to arise under the federal common law of foreign relations); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997) (same).

162. *Torres*, 113 F.3d at 542–43 (5th Cir. 1997).

163. *See id.* at 543.

164. *See id.* at 542–43.

costs, and the overall impact of litigation on a foreign sovereign.[165] Similarly, the limited judicial role in foreign affairs is premised in part on a broad policy goal of federal uniformity in foreign affairs. Thus, to the extent judicial decisions under the federal common law of foreign relations seek merely to protect this uniformity, courts are competent as a matter of policy to make such determinations.

Finally, state courts are substantially less competent than federal courts to adjudicate issues implicating foreign relations. Disparate state laws on issues from res judicata to punitive damages risk exposing foreign states to inconsistent obligations, thus warranting national uniformity in foreign relations achieved through federal court jurisdiction. Even assuming state courts may effectively adjudicate claims touching foreign relations, such competence does not undermine the validity of federal question jurisdiction over such claims. State courts are competent to apply federal law, including—theoretically at least—a claim pertaining to the federal common law of foreign relations. But a defendant wishing to remove that claim to federal court is not precluded from doing so on grounds that a state court is equally competent to adjudicate the claim.

Thus, criticisms of the federal common law of foreign relations on grounds of institutional competence generally misconstrue an expansive approach by focusing on foreign protests to the litigation. Further, the competence of federal courts in foreign relations is similar to other functionally similar areas of constitutional jurisprudence, such as the dormant Commerce Clause and dormant foreign affairs powers, in which the judiciary has the competence and authority to make independent assessments of state regulation as a matter of policy.[166] To the extent that the federal common law of foreign relations seeks to promote national uniformity in foreign relations, federal courts are entrusted with the authority and competence to further that goal.

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165. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 422–23 (2003); CHEMERINSKY, *supra* note 35, at 149 (noting that many foreign policy questions presented to courts do not involve matters of expertise but rather pose questions of interpretation) (citing Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976)).

166. *See* HENKIN, *supra* note 56, at 135; Goldsmith, *supra* note 10, at 1628–29.

2. Federal Common Law as Jurisdictional Hook

Courts and scholars disagree over whether *Sabbatino* and the federal common law of foreign relations should be used as a basis for federal question jurisdiction.[167] As a jurisdictional issue, the dispute can be framed largely as disagreement over the appropriate application of the well-pleaded complaint rule.[168] In other words, no consensus exists on the degree or kind of impact on foreign relations necessary to constitute a substantial issue of federal law. Under a narrow reading of the federal common law of foreign relations, federal courts lack federal question jurisdiction absent explicit congressional action creating jurisdiction over matters that merely implicate foreign relations.[169] This approach echoes an application of *Merrell Dow* that *requires* a private right of action to find a "substantial" federal issue.[170] On the other hand, a multifactor approach—granting federal question jurisdiction over claims that strike at the vital economic and sovereign interests of a foreign state even without a congressionally created remedy—applies a more flexible reading of the well-pleaded complaint rule,[171] in which a federal right of action is sufficient, but not necessary, to constitute a substantial federal issue.[172] This expansive approach to the federal common law of foreign relations should therefore generally take into consideration the complexity of the litigation, the increased caseload resulting from a grant of jurisdiction, and the importance of the federal issues at stake.[173]

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167. Some commentators have criticized the federal common law of foreign relations as a form of protective jurisdiction that seeks to promote federal interests by granting a federal forum to claims that do not otherwise meet Article III requirements—and which has been rejected as a jurisdictional basis by the Supreme Court. *See, e.g.*, Andrew C. Baak, *The Illegitimacy of Protective Jurisdiction over Foreign Affairs*, 70 U. CHI. L. REV. 1487, 1504–06 (2003).

168. *See, e.g.*, Republic of Venezuela v. Philip Morris Inc., 287 F.3d 192, 200–01 (D.C. Cir. 2002) (Williams, J., concurring); Patrickson v. Dole Food Co., 251 F.3d 795, 803 (9th Cir. 2002), *aff'd in part*, 538 U.S. 468 (2003); *Torres*, 113 F.3d at 542–43; Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62 (S.D. Tex. 1994).

169. *See Patrickson*, 251 F.3d at 803.

170. *See id.*

171. *See Torres*, 113 F.3d at 543; *Sequihua*, 847 F. Supp. at 63; *accord* W. 14th St. Commercial Corp. v. 5 W. 14th Owner's Corp., 815 F.2d 188, 193 (2d Cir. 1987).

172. *See Torres*, 113 F.3d at 543.

173. *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 811, 814 n.12 (1986).

Moreover, the Ninth Circuit's view of congressional inaction as an implicit refusal to grant jurisdiction over the federal common law of foreign relations suggests that no claim impacting U.S. foreign relations could be substantial enough under *Merrell Dow* to support federal question jurisdiction.[174] Thus, a narrow reading would deny federal jurisdiction even in extreme cases in which private international litigation would have a potentially devastating effect on a foreign state's economy, political structure, or sovereignty. An analysis of factors including the impact on a state's economy, the state's participation in and regulation of a particular industry, and its resistance to the litigation is better suited to pragmatic determinations of when such litigation might present a substantial question of federal law. Further, while congressional inaction may weaken the argument for complete preemption removal,[175] it is less persuasive as a ground for refusing to examine the plaintiff's complaint for a substantial federal issue giving rise to federal question jurisdiction. Other areas of federal common law support federal question jurisdiction without explicit congressional approval.[176] Indeed, the cause of action at issue in *Patrickson* arguably presents a "substantial" issue of federal law under both the narrow and broad interpretations of *Merrell Dow*:[177] the court could have read the federal common law of foreign relations as a federal right of action created by the judiciary and giving rise to a substantial issue of federal law. Instead, this approach concludes that Congress's failure to speak directly to the jurisdictional question is an indication of its intent to exclude federal question jurisdiction under the common law of foreign relations.

As with dormant federal powers, this congressional silence could be read in part as congressional inertia—an implicit invitation to courts to fill gaps unless and until Congress speaks to the issue.[178] To the extent that the federal common law of for-

174. *See Patrickson*, 251 F.3d at 803 ("[W]e see no logical connection between . . . an effect [on foreign relations] and the assertion of federal-question jurisdiction.").

175. *But see* Beneficial Nat'l Bank v. Anderson, 539 U.S. 9 n.5 (2003) (permitting removal under complete preemption despite a lack of congressional intent to allow removal); *infra* Part II.A.3.

176. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972).

177. *See supra* notes 29–36 and accompanying text.

178. *See* Goldsmith, *supra* note 10, at 1630–31 n.56 (noting congressional power to override Court decisions in foreign affairs "flow[ing] from the justification for federal judicial lawmaking . . . which is the protection of political

eign relations is premised on a structural delegation of constitutional power to the courts,[179] congressional silence with respect to the multifactor approach may indicate Congress's implicit approval of a more expansive reading of the federal common law of foreign relations. In either case, the Ninth Circuit's narrow reading of the well-pleaded complaint rule suggests a broad rejection of the federal common law doctrine.[180] An expansive approach to the federal common law of foreign relations has been steadily refined as its application has increased, suggesting that as use of the federal common law of foreign relations continues, courts will develop their analysis to accommodate competing interests of federalism and political branch power.[181] Thus, determining whether a substantial federal issue is present under the federal common law of foreign relations should depend on a court's case-by-case analysis of foreign policy implications. This analysis should take into account pragmatic considerations such as increased caseloads and the necessity of a federal forum, and policy considerations such as the strength of the federal interests involved and the impact on foreign relations.[182]

3. The Complete Preemption Alternative

Dormant foreign affairs preemption[183] offers an alternative approach to determining when a state law claim implicating foreign relations presents a federal question. The Supreme Court's recent treatment of the dormant foreign affairs power has clarified when a state law is subject to foreign relations

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branch prerogatives").

179. *See id.*

180. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 803 (9th Cir. 2002), *aff'd in part*, 538 U.S. 468 (2003).

181. *Compare* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62 (S.D. Tex. 1994) (treating the official protests of foreign governments as sufficient to raise a federal question and support removal under the federal common law of foreign relations), *with* Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997) (stating that a foreign state's expressed interest in the litigation is not by itself sufficient to create a federal question under the federal common law of foreign relations).

182. *See* FALLON ET AL., *supra* note 33, at 931 (noting wide discretion to tailor "arising under" jurisdiction to the "practical needs of the particular situation") (citing Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 813 n.12 (1986); William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967)).

183. *See supra* Part I.D.2 (describing the Court's dormant foreign affairs preemption jurisprudence).

preemption, absent explicit political branch action.[184] A narrow reading[185] of dormant foreign affairs preemption requires balancing legislation in areas of traditional state competence against federal interests in uniformity.[186] The *Garamendi* Court nonetheless affirmed its power to independently assess foreign relations implications, and to find state laws preempted absent explicit conflict with executive or congressional action.[187]

The Court's reading of a broad foreign relations field suggests an alternative ground for removal under complete preemption.[188] While cases may not be removed to federal court solely on the basis of a federal defense,[189] defendants may remove where a federal statute is intended to exclude state causes of action.[190] To the extent that the post-*Beneficial* understanding of complete preemption blurs the line between complete and field preemption,[191] it suggests that a broad reading of the foreign affairs power exclusive of state action may provide a sufficient basis for removal. That is, complete preemption may be warranted as a matter of constitutional law where the text or structure of the Constitution itself intends federal power exclusive of the states.[192] Similarly, the federal common law of foreign relations—premised on a robust foreign relations field and an independent judicial assessment of foreign policy implications subject to congressional review—may serve as a basis for complete preemption removal to federal

184. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003).

185. *Id.* This narrow reading is that of Justice Harlan in *Zschernig*, whose concurring opinion sought to establish the higher standard of conflict preemption in the Court's dormant foreign affairs analysis, rather than the majority's field preemption. Zschernig v. Miller, 389 U.S. 429, 459 (1968) (Harlan, J., concurring).

186. *Garamendi*, 539 U.S. at 419 n.11.

187. *Id.* at 428–30.

188. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–66 (1987); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 25–27 (1983); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 559–60 (1968).

189. *See* Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

190. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 n.5 (2003).

191. *See supra* Part I.D.1 (discussing the implications of *Beneficial* on the complete preemption doctrine).

192. *See, e.g.*, HENKIN, *supra* note 56, at 163–65 (noting that even absent federal action the foreign affairs power may be read to exclude state action in the interest of national uniformity in foreign relations).

court.[193] This approach is problematic because the federal common law of foreign relations is judge-made law—no congressional intent to preempt state law exists under the doctrine—and complete preemption removal has generally been reserved for instances in which federal legislation explicitly seeks to exclude state law.[194] Further, while dormant foreign affairs preemption generally applies to state laws that intrude on foreign policy,[195] the federal common law of foreign relations applies to traditional state law claims that impact a foreign state's vital economic or sovereign interests when litigated by foreign parties.[196]

Nonetheless, complete preemption removal under the Court's dormant foreign affairs power is helpful as an analogy to removal under the federal common law of foreign relations. To the extent complete preemption constitutes an "exception" to the well-pleaded complaint rule, one might argue that removal under the federal common law of foreign relations similarly obviates the need for a congressionally created federal remedy, given the strength of the federal foreign affairs field.[197] In other words, state law claims that substantially impact foreign relations will warrant federal question jurisdiction because they impinge on, and are completely preempted by, the broad foreign affairs powers of the political branches. An expansive approach to the federal common law of foreign relations allows courts the discretion to determine when such claims are sufficiently substantial to present a federal question by implicating the foreign affairs powers. The question remains, however, at what point a state law claim impacting foreign relations becomes substantial enough to arise under the federal common law of foreign relations.

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193. *See, e.g.*, Marcos v. Republic of Philippines, 806 F.2d 344, 354 (2d Cir. 1986) (citing *Franchise Tax Bd.*, 463 U.S. at 23; *Avco Corp.*, 376 F.2d at 340).

194. *See* Anderson v. H & R Block, Inc., 287 F.3d 1038, 1043 (11th Cir. 2002), *rev'd sub nom. Beneficial Nat'l Bank*, 539 U.S. at 1.

195. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 417–18 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 376 (2000).

196. However, one may argue that a prohibition on state law claims implicating foreign relations is analogous to state legislation in the foreign affairs field, which is prohibited under the dormant foreign affairs power. *See Garamendi*, 539 U.S. at 417–18; *see also* Zschernig v. Miller, 389 U.S. 429, 440 (1968) (stating that "judicial criticism of nations" under state laws is grounds for preempting those laws).

197. Indeed, this was one of the possible approaches suggested by the *Marcos* court. 806 F.2d at 354.

B. A MULTIFACTOR APPROACH TO THE FEDERAL COMMON LAW OF FOREIGN RELATIONS

The dispute over the federal common law of foreign relations is less about the validity of the doctrine,[198] and more about the threshold determination of when a claim implicates the federal common law of foreign relations and becomes sufficiently substantial to support federal question jurisdiction. A narrow reading of the federal common law of foreign relations limits this determination to claims that involve an act of a foreign state,[199] while an expansive application finds a federal question for claims that impact the vital economic or sovereign interests of a foreign state.[200] While the narrow approach creates an administrable bright-line rule, courts must recognize the increasing possibility that domestic litigation will substantially impact a foreign state's economic and sovereign interests. At the same time, globalization is increasingly commonplace. Criticisms of the federal common law of foreign relations raise legitimate concerns that most, if not all, private international litigation will have at least some impact on economic or sovereign interests abroad. The question is where to draw the line.

1. The Advantages of a Multifactor Approach

An expansive approach relies on a multifactor, case-by-case analysis to determine when a state law claim sufficiently implicates foreign relations to constitute a federal question under the federal common law of foreign relations.[201] Such an approach should generally take into consideration: (1) the overall economic impact of litigation on the foreign state; (2) the foreign state's participation in and regulation of the affected industry; (3) the foreign state's purported interest in and protests to the litigation; and (4) the traditional state interests involved in adjudicating the dispute.

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198. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 800 (9th Cir. 2001) (stating that if a claim arises under the federal common law created in *Sabbatino*, then federal courts will have federal question jurisdiction), *aff'd in part*, 538 U.S. 468 (2003).

199. *See id.*

200. *See, e.g.*, Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377–79 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997).

201. *See Torres*, 113 F.3d at 542–43; *see also supra* notes 87–90, 164, and accompanying text.

Application of these factors allows courts to make pragmatic determinations about when the federal interest in national uniformity presents a federal question. A multifactor approach relies on and encourages the development of the judiciary's competence to gauge the foreign policy implications of litigation, an area of jurisprudence that seems likely to grow as litigation becomes increasingly global. This approach poses little risk of imposing itself on political branch hegemony in foreign affairs—the federal common law of foreign relations is exercised, and justified, in view of congressional silence, subject to review and revision by the political branches. Moreover, expansive jurisdiction ensures uniformity in foreign relations by preventing divergent state court rulings from imposing conflicting obligations on foreign states.

2. Applying Expansive Jurisdiction in Foreign Relations

Courts confronted with a defense invoking the federal common law of foreign relations must decide whether the issue litigated is sufficiently substantial to constitute a federal question. In so doing, courts should apply a multifactor approach to determine whether a state law claim implicates the federal common law of foreign relations by examining the effects of the litigation on a state's economic and sovereign interests, the state's protests to the lawsuit, and the federal and state interests involved in adjudication. A multifactor approach recognizes the increasing possibility that some state law claims will substantially impact foreign economic and sovereign interests. As such, these state law claims constitute a substantial federal question, supporting federal jurisdiction under § 1331.

a. Gauging the Impact on Economic and Sovereign Interests

Courts confronted with a defense invoking the federal common law of foreign relations should examine the possible economic and sovereign impact of such litigation on a foreign state. Because very few cases have found the requisite impact to invoke federal question jurisdiction,[202] there is no judicial benchmark that triggers the federal common law of foreign relations. Indeed, the shortage of successful claims under the federal common law of foreign relations suggests that criticism of an expansive approach on grounds of federalism and separation of powers is generally unfounded. Nonetheless, judicial concern

202. *See, e.g.*, *Torres*, 113 F.3d at 543.

that litigation will disrupt federal uniformity in foreign affairs must be more than speculative, and should be based on a finding that the litigation will impact "vital" economic and sovereign interests.[203] Indeed, it is critical that a suit impact both economic *and* sovereign interests—economic considerations, such as the size of the regulated industry or the industry's contribution to a foreign state's gross domestic product or export income,[204] serve primarily to underscore the impact on foreign state sovereignty. Thus, courts should similarly examine the foreign state's participation in and regulation of the particular area of litigation.

These considerations constitute a judicial determination that a state law claim may be transformed into a federal question by virtue of its potential impact on foreign relations. As such, courts examine economic and sovereign interests as a variation on *Merrell Dow* and the well-pleaded complaint rule.[205] Analysis of when a federal issue raises a substantial federal question is precisely the kind of judicial determination courts are competent to make. That particular issues touch foreign policy considerations is wholly relevant to determining whether those claims present substantial issues of federal law, and favors the independent judicial assessment of the federal common law of foreign relations.

b. Protests by Foreign Governments to State Litigation

A multifactor approach should take into consideration protests by a foreign state to the litigation in determining whether a state law claim presents a federal question under the federal common law of foreign relations.[206] However, such protests are not dispositive, and critiques have correctly warned against allowing foreign states to dictate a forum merely by expressing some interest in the litigation.[207] Rather, protests and complaints by foreign states should serve to alert courts to the possibility that state law claims substantially intrude into federal foreign relations by impacting that state's vital economic and sovereign interests.

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203. *Id.*

204. *See id.* at 542–43.

205. *See supra* Part II.A.2.

206. *See, e.g.*, Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377–79 (11th Cir. 1998).

207. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 804 (9th Cir. 2002), *aff'd in part*, 538 U.S. 468 (2003).

c. Balancing State and Federal Interests

A multifactor approach to determining when a claim arises under the federal common law of foreign relations is supported by recent dormant foreign affairs preemption analysis.[208] In particular, analysis of when a claim impacts foreign relations such that it becomes a substantial issue of federal law should examine both the state and federal interests in adjudicating the claim. Taking into consideration *Garamendi*'s apparent reluctance to preempt state law under a broad foreign relations field,[209] courts should assess when claims arise under the federal common law doctrine in part by using a balancing test similar to that suggested by the Court in determining when state action is preempted by the foreign affairs power.[210]

Similar to the analysis suggested in *Garamendi*,[211] courts could weigh the state's interest, along with its traditional competence to regulate the law at issue, against the importance of the federal interests in question.[212] Thus, where state legislation does not address a "traditional state responsibility,"[213] but implicates foreign affairs and has a substantial impact on foreign states, defendants might remove under the federal common law of foreign relations by analogy to "complete preemption" under dormant foreign affairs preemption.[214] Despite the lack of express congressional intent to preempt the state law at issue, the federal common law of foreign relations is itself the product of an exclusive foreign affairs power. The doctrine reflects a broad policy concern for national uniformity in foreign relations, and is based on implicit congressional approval of independent judicial determinations in foreign policy, subject to congressional revision.[215] Although the analogy between the federal common law of foreign relations and foreign affairs preemption is an imperfect one, it rightly suggests a balancing of state and federal interests in controlling adjudication to further a policy of uniformity in foreign relations.

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208. *See supra* Part I.D.2 (discussing the development and recent treatment of dormant foreign affairs preemption).

209. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419–25 (2003).

210. *See id.*

211. *See id.* at 419 n.11.

212. *See id.*

213. *Id.*

214. *See supra* Part II.A.3.

215. *See supra* Part I.D.1.

CONCLUSION

The federal common law of foreign relations provides a jurisdictional hook for state law claims that implicate U.S. foreign relations, allowing defendants to remove those claims to federal court. Courts have struggled to define both the point at which claims impacting foreign affairs trigger the federal common law of foreign relations, and the type of impact substantial enough to warrant federal question jurisdiction. In view of political branch authority over foreign relations, state law claims that impact foreign relations impinge on the federal field of foreign affairs, giving rise to a federal issue sufficient for removal under the common law doctrine. Although domestic-international distinctions continue to blur, and most private international litigation in the United States has some impact on foreign states, the impact will at times be substantial enough to warrant federal uniformity. An expansive treatment of the federal common law of foreign relations, one which grants federal question jurisdiction over claims implicating foreign economic and sovereign interests, is consistent with recent foreign affairs jurisprudence and recognizes the practical necessity of effective management of such global litigation. A multifactor approach provides the optimal framework for assessing claims implicating U.S. foreign affairs. This approach properly relies on judicial competence to assess and gauge economic effects, poses little threat to political branch hegemony in foreign affairs, and allows courts to grapple with and refine the appropriate standards through a judicial common law process.